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SUBJECT: WRANGLE OVER FLOOR-CROSSING LAW LEAVES PARLIAMENT IN LIMBO

REF: A) LILONGWE 976

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¶1. (SBU) Summary: Malawi's Constitutional Court has ruled that President Mutharika cannot appeal its advisory opinion on the controversial "floor-crossing" law. The ruling puts the ball firmly in the hands of the Speaker of Parliament, who could use the opinion to declare vacant the seats of over eighty MPs, most of whom belong to Mutharika's political party. However, a number of hurdles remain before party defectors could lose their seats, and legal challenges will likely drag on for many months before any action is taken. The conflict will further slow the pace of legislative business and needed reforms, and could keep Parliament from reconvening until June 2007. End Summary.

#### Advisory Opinion Stands

¶2. (U) The Constitutional Court ruled that its November 7 opinion (reftel) did not directly affect the President or any Members of Parliament. It merely clarified the authority of the Speaker to declare vacant the seats of those who have left their parties, under Section 65 of the constitution. According to Malawian law, this means that there is no aggrieved party to appeal the ruling, and thus the court denied the President's motion.

¶3. (U) Instead, if and when the Speaker declares parliamentary seats vacant, the MPs themselves must then challenge the Speaker's decision at the High Court. If unsuccessful at the High Court, they would have the option of appealing to the Supreme Court as the final arbiter. Each of these appeal steps could take months or even years to work their way through the courts. By way of example, it took almost exactly a year for the Constitutional Court to render its decision.

#### Petitions and Delays

¶4. (U) As the party with the most seats to lose, President Mutharika's Democratic Progressive Party (DPP) went on the offensive this week, petitioning the Speaker to vacate all the seats of the opposition United Democratic Front (UDF), arguing that the UDF members crossed the floor when they moved to opposition after Mutharika quit the party in 2005. An independent Blantyre MP filed a separate petition asking that 20 formerly independent MPs be removed from their seats for joining the UDF and the Malawi Congress Party (MCP). There will likely be more such petitions and counter-actions in the coming weeks.

15. (U) The Speaker cannot, however, declare the seats vacant until Parliament officially meets, which normally occurs four times a year. But the constitution requires the president's approval to hold a session, and Mutharika will likely hold off as long as possible before agreeing to let Parliament meet. This could delay the next session until May or June 2007, when Parliament must meet for its constitutionally-mandated annual budget session.

16. (SBU) With a delay in Parliament's next session and the prospect of protracted legal challenges, it is easy to conceive of a scenario whereby the floor-crossing issue drags out until the next general elections in 2009. One government minister who might be affected privately admitted as much, saying that he is "not scared by the ruling... I know how to deal with it. If they come after my seat, I'll just take it to court and get an injunction for the next two years."

#### Election Complications

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17. (U) If a large number of seats are declared vacant and upheld by the courts, Malawi would be forced to hold the largest and most costly by-election in its history. Authorities are not, however, in a position to stage such a large election. The independent Malawi Electoral Commission (MEC) currently has a number of vacant seats and does not have a quorum, so conducting any election is legally impossible. President Mutharika two weeks ago proposed several candidates to fill the long-vacant slots, but the opposition is protesting the nominations via the courts and an injunction has prevented the new commissioners from taking up their duties. When the new commissioners are finally in place, experts say the MEC will require between nine and eighteen months to prepare for an election, depending on decisions the Commission makes about the voter lists and logistics and, of course, donor funding.

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18. (U) The floor-crossing tussle further complicates the already murky situation of local government elections, which were due to be held in May 2005 but were delayed due to a food crisis at that time.

For nearly a year, civil society and donors have been pressing the GOM to hold the delayed local elections, and the President and his ministers have resisted, on grounds of the substantial running costs and perceived ineffectiveness of elected local government. Mutharika has publicly stated his desire to postpone local elections to coincide with the next general election in 2009, constitutional violations notwithstanding; his Minister for Local Government was quoted in the press this week to the effect that the local council elections would be held in 2007 (with a large caveat about the possible negative effect of the floor-crossing controversy). And the political reality is that holding local council elections in 2007 would require a constitutional amendment, a thing difficult to imagine with the National Assembly in such terrible uncertainty.

#### Comment: A Recipe for Gridlock and Slower Reform

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19. (SBU) This conflict will lead to even further legislative paralysis, as parliament will likely not meet for some time, and lawmakers will not attend to the ever-growing list of legislation in need of enactment. Demands for Parliament to meet will only grow louder, both from the Opposition who want action against the floor-crossing government MPs, as well as civil society and donors who wish for progress on legislation.

110. (SBU) At the same time, the dispute serves an immediate purpose for the two key actors in this drama-- the President and the Speaker-- by postponing difficult decisions to a later date. Mutharika is in no hurry for Parliament to meet and risk being stripped of nearly all his support in the house, subject to the uncertainty of a budget-busting by-election. The conflict also delays the local council elections, suiting the president's wishes. For his part, the Speaker is equally unenthusiastic at the prospect of being the man who single-handedly brings down the government and provokes a constitutional crisis. The inability of the election

commission to conduct a timely poll also provides a useful justification for the Speaker not to act.

¶11. (SBU) As happens so often in Malawi, leaders will likely take the path of least confrontation and will let the process fall to the courts, so that tough decisions can be avoided. The main casualty will be Mutharika's reforms, which will certainly be further delayed by this intrusion of hardball politics.

EASTHAM